



UNITED  
NATIONS



**United Nations Diplomatic Conference  
of Plenipotentiaries on the Establishment  
of an International Criminal Court**

Rome, Italy  
15 June-17 July 1998

Distr.  
GENERAL

A/CONF.183/C.1/SR.10  
20 November 1998

ORIGINAL: ENGLISH

**COMMITTEE OF THE WHOLE**

**SUMMARY RECORD OF THE 10th MEETING**

**Held at the Headquarters of the Food and Agriculture Organization of the United Nations  
on Monday, 22 June 1998, at 3 p.m.**

**Chairman: Mr. P. KIRSCH (Canada)**

**CONTENTS**

**Agenda item**

**Paragraphs**

- 11 Consideration of the question concerning the finalization and adoption  
of a convention on the establishment of an international criminal court  
in accordance with General Assembly resolutions 51/207  
of 17 December 1996 and 52/160 of 15 December 1997 (*continued*)

1-102

This record is subject to correction.

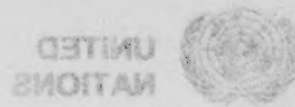
Corrections should be submitted in one of the working languages, set forth in a memorandum and/or incorporated in a copy of the record. They should be sent under the signature of a member of the delegation concerned to the Chief of the Official Records Editing Section, Room DC2-750, United Nations, New York.

In accordance with the rules of procedure for the Conference, corrections may be submitted within five working days after the circulation of the record. Any corrections to the records of the meetings of the Committee of the Whole will be consolidated in a single corrigendum.

V.98-57463 (E)

99-80981 (E)





*The meeting was called to order at 3.15 p.m.*

**CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (continued) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.7)**

*Part 2 of the draft Statute (continued)*

1. **Mr. POLITI** (Italy) said that Italy had always been in favour of giving the Prosecutor the authority to initiate investigations ex officio on the basis of information obtained from any source. His delegation supported the bracketed subparagraph (b) in the text for article 6 proposed in the "Further option for articles 6, 7, 10 and 11", as well as the text of article 12. In regard to the latter, it favoured the following formulation for the first sentence: "The Prosecutor may initiate investigations *proprio motu* or on the basis of information obtained from any source, in particular from Governments, United Nations organs and intergovernmental and non-governmental organizations." The second sentence would remain as drafted.
2. With regard to article 13, his preference was for an independent prosecutor who would not require specific authorization in order to initiate investigations. At the same time, he realized that a number of delegations were concerned that all possible guarantees should be provided against any improper use by the Prosecutor of the powers conferred on him or her, and could therefore accept the establishment of a mechanism of scrutiny on the basis of the proposals reflected in draft article 13.
3. **Mr. RWELAMIRA** (South Africa), speaking on behalf of the Southern African Development Community (SADC) and of his own delegation, said that he wished to associate himself with those who had spoken in favour of the inherent jurisdiction of the Court with regard to core crimes. The independence of the Prosecutor was critical to the effectiveness of the Court, and neither his delegation nor the SADC countries would like to see a situation in which the Prosecutor was dictated to either by individual States or by the Security Council.
4. Since the Prosecutor was a critical part of the trigger mechanism under the Statute, his or her role should be strengthened as much as possible, and he therefore supported the proposed article 6 in the "Further option for articles 6, 7, 10 and 11". Concerning article 12, he supported the view that the Prosecutor should be able to initiate investigations on the basis of information obtained from any source. In order to preserve the Prosecutor's independence, he would prefer the word "may" to be used in the article rather than the word "shall". In general, he would support removal of the brackets contained in the text.
5. Although his preference was for an independent prosecutor, he could accept the general content of the proposed article 13 in the light of the concerns expressed by others. Use of the Pre-Trial Chamber as a screening or filtering mechanism could allay some of the fears expressed, as well as providing a guarantee against unsubstantiated or frivolous complaints. However, he would like to have further discussion on the article before he took a firm position.
6. **Mr. BELLO** (Nigeria) said that the system of checks and balances which article 13 was intended to provide was inadequate. Under article 12, the Prosecutor was granted powers so enormous as to make that office a law unto itself. Moreover, those vast powers would invite complaints and ultimately make the Prosecutor ineffective. Nigeria therefore believed that articles 12 and 13, as well as the bracketed subparagraph (b) in article 6 in the "Further option for articles 6, 7, 10 and 11", should be deleted.

/...

7. **Mr. MANONGI** (United Republic of Tanzania) said it was very important that the Prosecutor be given an ex officio role if the universal regime of human rights protection was to be strengthened rather than weakened. His delegation could therefore accept that the Prosecutor be empowered to initiate investigations *proprio motu*.

8. However, he agreed with earlier speakers that the powers granted to the Prosecutor under article 12 needed to be qualified by the provisions proposed in draft article 13, whereby prior authorization by a pre-trial chamber would be required before an investigation could proceed.

9. **Ms. LI Yanduan** (China) said that her delegation did not agree that the Prosecutor should be given powers of investigation ex officio. It therefore proposed that article 6, paragraph 1 (c), as well as articles 12 and 13, should be deleted.

10. **Mr. VERGNE SABOIA** (Brazil) said that his delegation believed that the Prosecutor should be given powers to bring matters before the Court, and was therefore in favour of retaining article 6, paragraph 1 (c), or a similar wording. On the other hand, the Prosecutor should also be able to initiate investigations on the basis of information from a variety of sources, as indicated in article 12. Those powers should be subject to certain safeguards, and in that context he supported the system proposed in article 13, in particular regarding the role of the Pre-Trial Chamber. In his view, that issue was also related to the question of admissibility.

11. **Mr. SKIBSTED** (Denmark) said his delegation too believed that the Prosecutor should have powers of investigation ex officio. The text as drafted provided sufficient safeguards. The Prosecutor would have to decide that there was sufficient basis on which to proceed, and that evaluation would have to be approved by the Pre-Trial Chamber. The qualifications of the Prosecutor would have to be the same as those of the judges, and it was essential to ensure that the procedures for selecting members of the Court and for appointing the Prosecutor had the confidence of the world community.

12. The fact that the crimes to be tried by the Court were to be limited to the most serious offences should make it easier to agree on the prosecution of the offenders and allow the Court to become an effective instrument.

13. **Mr. IMBIKI** (Madagascar) said that if the Court was to be effective and credible it was important that the Prosecutor be made independent, and not subject to the authority of the Security Council. He or she would nevertheless not be immune from political pressures, which was why Madagascar agreed that any investigation launched should have the prior authorization of the Pre-Trial Chamber.

14. The Prosecutor would be required to initiate an investigation of a complaint brought by the Security Council or a State party; provision would have to be made to ensure that, should he or she refuse to act, the complainant could bring the matter to appeal.

15. **Mr. KAUL** (Germany) said Germany believed that in order to ensure the independence of the Prosecutor it was vital to give him or her the power to initiate investigations ex officio, since otherwise prosecutions could only be brought if a State party or the Security Council referred a situation to the Court. Giving the Prosecutor the power to act *proprio motu* would have the advantage of depoliticizing the process of initiating investigations.

16. Article 13 of the draft Statute reflected a proposal submitted jointly by Germany and Argentina. In response to the concerns expressed by a number of delegations, it would subject the Prosecutor to a form of judicial control when initiating investigations ex officio.

17. **Mr. SALAND** (Sweden) said his delegation did not wish the Court to be a mere tool of the Security Council; it should be truly effective, and the Prosecutor should be given an *ex officio* role. He fully supported the formula for judicial review contained in article 13, which would not only be a safeguard against frivolous complaints, but would also protect the Prosecutor from undue political pressure.

18. It was the duty of the Court at all stages of the proceedings to satisfy itself not only that it had jurisdiction in a particular case, but also that the case was admissible, and in that connection he agreed that lack of sufficient gravity should be a ground for inadmissibility.

19. **Ms. BLOKAR** (Slovenia) said that she supported the Prosecutor's right to trigger the Court mechanism and to initiate investigations *ex officio*. She therefore supported the bracketed subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11".

20. She also supported article 12, with the deletion of the brackets around the words "and intergovernmental and non-governmental organizations", and the deletion of the last sentence. In response to those who had expressed the view that the Prosecutor should not have an *ex officio* or *proprio motu* role, she drew attention to article 43, paragraph 3, which stipulated that the Prosecutor was to be a person of high moral character, be highly competent and have extensive practical experience.

21. **Mr. KESSEL** (Canada) endorsed the views of those who favoured a prosecutor empowered to initiate proceedings *ex officio* based on information from all sources. Articles 12 and 13 provided sufficient safeguards in that respect, and he could not see how giving the Prosecutor the independence he or she needed could undermine the concept of complementarity.

22. **Ms. HERTZ** (Chile) said Chile had always believed that, if the Court was to be effective, the Prosecutor should be given powers to initiate investigations *ex officio* on the basis of reliable information. She could accept the wording proposed for article 6, and was in general agreement with the text of article 13, which should provide sufficient guarantees to satisfy both States parties and world opinion.

23. **Mr. Khalid Bin Ali Abdullah AL-KHALIFA** (Bahrain) said his delegation believed that the Prosecutor should not take action on his or her own initiative, and that the role he or she should play should be subject to clear limits. The sources of information used had to be limited too, so that information would be accurate and credible. The expression "any source" should be eliminated, as well as the mention of different sources. The Prosecutor's role should be subject to judicial control at all stages.

24. **Mr. MINOVES TRIQUELL** (Andorra) said that the Prosecutor's independent role was very important where heinous crimes were concerned. Articles 12 and 13 should be retained, as well as paragraph 1 (c) in article 6 (first version).

25. **Ms. DASKALOPOULOU-LIVADA** (Greece) said her delegation believed that the Prosecutor should be given powers to prosecute *ex officio*, since otherwise the bulk of the crimes which warranted international action would go uninvestigated and unpunished.

26. The precedent established by the *ad hoc* Tribunals for the former Yugoslavia and Rwanda militated in favour of such *ex officio* powers, and she accordingly favoured retention of article 6 (first version), paragraph 1 (c), or the bracketed subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11". She also supported article 12, and could accept the idea embodied in article 13, provided that the Prosecutor was given the option of reintroducing a request if new evidence became available.

27. **Ms. DIOP** (Senegal) supported the view expressed by earlier speakers that a strong, independent Prosecutor empowered to obtain information *ex officio* was crucial if the Court was to be effective. She therefore favoured the variant contained in article 6 (first version), paragraph 1 (c).

28. She could accept the text proposed for article 12, provided that an alternative was found for the expression "from any source" in the first sentence. Not all sources of information were equally credible. She fully supported article 13; prior authorization by a pre-trial chamber would act as a safeguard against any abuses on the part of the Prosecutor.

29. **Mr. DHANBRI** (Tunisia) said that his country had some misgivings as to the powers being granted to the Prosecutor in the draft proposed. His delegation believed that action should only be initiated on the basis of a complaint submitted by a State.

30. **Mr. KERMA** (Algeria) said that the role assigned to the Prosecutor in the draft text posed certain problems in regard to the principle of complementarity. His delegation was opposed to granting the Prosecutor powers to initiate investigations *ex officio*. Such investigations could in any case only proceed subject to the approval of the Pre-Trial Chamber, and he considered that article 12 should either be deleted or completely redrafted.

31. **Mr. GOULIYEV** (Azerbaijan) supported the functions for the Prosecutor defined in article 12, and favoured deletion of the brackets around "and intergovernmental and non-governmental organizations". The brackets in article 13 should also be deleted. The crime of aggression should be included in the list of crimes within the jurisdiction of the Court contained in article 5.

32. **Mr. Tae-hyun CHOI** (Republic of Korea) said his delegation agreed with previous speakers that the Prosecutor should have *ex officio* powers of investigation, with no restriction on sources of information. He endorsed the content of article 13, but considered that it should provide specifically for the possibility of a prosecutor abusing his or her powers.

33. **Mr. CAFLISCH** (Switzerland) said that his delegation attached great importance to the Prosecutor being empowered to obtain information *ex officio* as provided for in the bracketed subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11", and in article 12. Switzerland also supported the concept of control by the Pre-Trial Chamber contained in article 13.

34. **Mr. AGBETOMEY** (Togo) said that if the Court was to be effective the Prosecutor should be enabled to play his or her role to the full, and to bring before the Court situations that had come to his or her attention by whatever means, provided that there was sufficient information on which to base the prosecution.

35. In order to dispel the concerns expressed, there should be a system of safeguards to prevent the Prosecutor from being subject to undesirable influences. The provisions of article 6 (first version), paragraph 1 (c), and of articles 12 and 13 should therefore be retained.

36. **Mr. DABOR** (Sierra Leone) said the Prosecutor should be empowered to initiate investigations *proprio motu* on the basis of information received from victims, intergovernmental organizations or non-governmental organizations. However, those powers should be subject to the safeguards provided for in article 13. In the first line of article 12, the word "may" should be used in preference to the word "shall" in order to give the Prosecutor discretion not to investigate frivolous complaints.

37. **Mr. GÜNEY** (Turkey) agreed with earlier speakers that to give an ex officio role to the Prosecutor would have adverse effects on the principle of complementarity. To extend the Prosecutor's powers unduly might lead to a deluge of complaints of a political nature which could reduce his or her effectiveness.
38. **Mr. MATSUDA** (Japan) said that allowing the Prosecutor to launch investigations ex officio would upset the balance between States parties and the Court by making the latter a kind of "supra-structure" with authority over States. In his view, complaints by States parties and referrals by the Security Council should adequately cover all serious crimes of international concern. If the Prosecutor was pressured into taking up a case by outside influences, the credibility of the Prosecutor and of the Court could be jeopardized.
39. **Mr. AL AWADI** (United Arab Emirates) agreed that to give the Prosecutor an ex officio role could be dangerous: the role of initiating action belonged solely to States. His delegation did not support article 12 and could not accept article 6 (first version), paragraph 1 (c).
40. **Mr. MAHMOOD** (Pakistan) supported that position. However, once a State had initiated proceedings, the Prosecutor should be given full independence in conducting the investigation.
41. **Mr. DA COSTA LOBO** (Portugal) considered that the effectiveness and credibility of the Court would depend on the Prosecutor having ex officio powers to initiate investigations.
42. **Mr. KAM** (Burkina Faso) said that he, too, favoured empowering the Prosecutor to initiate proceedings as provided for in article 6 (first version), paragraph 1 (c), and in article 12. That would enable an independent prosecutor with a purely judicial role to act in cases where States or the Security Council might block investigations because of the political interests at stake. The Prosecutor's powers should nevertheless be subject to control by the Pre-Trial Chamber.
43. **Ms. VEGA** (Peru) endorsed that view, and supported the joint proposal of Germany and Argentina contained in article 13.
44. **Mr. PEREZ OTERMIN** (Uruguay) considered that the risks of granting the Prosecutor ex officio competence were greater than the benefits, for the reasons already advanced by other speakers.
45. **Mr. HUARAKA** (Namibia) said that his country favoured an effective court and an independent prosecutor. It had been argued that a "rogue" prosecutor could emerge, but that was unlikely in view of the qualifications required for the office. It was important to have an effective, independent court, bearing in mind experience during the cold war. His delegation favoured retention of the relevant provisions of the draft.
46. **Ms. FRANKOWSKA** (Poland) supported articles 12 and 13.
47. **Ms. TASNEEM** (Bangladesh) said that, although the system of checks and balances provided by the provisions regarding the Pre-Trial Chamber offered some assurances against abuses by the Prosecutor, she was opposed to having so much power vested in a single individual. The composition of the Pre-Trial Chamber should be representative both in terms of equitable geographical distribution and in terms of the major international legal systems.
48. **The CHAIRMAN** invited comments on the role of the Security Council.

49. **Mr. KOURULA** (Finland), acting as Coordinator, drew attention in particular to the two options given for article 10, paragraph 7. Under option 1, no prosecution could be commenced arising from a situation being dealt with by the Security Council, unless the latter decided otherwise. Under option 2, which reflected a Singapore/Canadian proposal, the Court could proceed with a prosecution after a period of time unless requested not to do so by a vote of the Security Council. There had also been proposals from the United Kingdom and Belgium.

50. **Mr. MOLNAR** (Hungary), referring to article 13, proposed that a mention of "intergovernmental organizations" should be added in the second sentence of paragraph 1.

51. In regard to the Security Council, his delegation supported the Singapore/Canadian proposal, possibly with the amendments proposed by the United Kingdom and Belgium.

52. **Mr. GONZALEZ GALVEZ** (Mexico) noted that the Conference was taking place at a time when the United Nations was discussing a number of proposals for reform of the Security Council; those discussions were relevant to the present debate. The Conference should not repeat the mistake made at San Francisco by tying the new Court to the organs of the United Nations, like the International Court of Justice. The Security Council would be one source of information for the Court regarding the existence of situations involving aggression, but not the only one. However, the Council, or rather the United Nations as a whole, would have a role in ensuring that the Court's decisions were implemented.

53. **Mr. LAHIRI** (India) said that the Court was an independent judicial body, not a political forum. The Security Council's powers and responsibilities were already provided for in the United Nations Charter, and could not be subtracted from or added to by the Court's Statute. If the intention was to add to the Security Council's powers through the Court, it must be borne in mind that the Court, unlike the Council, had no role whatsoever in the maintenance of international peace and security. Moreover, a large majority of United Nations Member States considered that the structure of the Security Council was unrepresentative.

54. It had been suggested that a Security Council referral should create a "green channel" in which the safeguards provided under articles 6, 7 and 9 could be dispensed with, but it should be pointed out that a single veto by one of the five veto-holding members of the Council would be sufficient to block such a referral. India was completely opposed to such a discriminatory arrangement.

55. **Ms. BLOKAR** (Slovenia) said that as she saw it the Security Council, as the main international organ responsible for international peace and security, should have the power to refer situations to the Prosecutor. That should eliminate the need for ad hoc tribunals. She therefore supported the second subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11".

56. Consideration of a matter by the Security Council should not prevent the Court from acting since, whereas the functions of the Council were political, those of the Court, like those of the International Court of Justice, were purely judicial. As a compromise, her delegation could accept the provision contained in paragraph 1 of article 10 in the "Further option"; the second sentence of that paragraph was particularly important. She could go along with paragraph 2, despite doubts regarding the time-frame involved and the clause concerning renewal.

57. She supported the Belgian proposal regarding the preservation of evidence.

58. **Mr. SALAND** (Sweden) said that he had no problem with the second subparagraph (b) of article 6 in the "Further option", provided that the Security Council was acting under Chapter VII of the United Nations Charter. He could accept article 10 of the "Further option" if the wording in square brackets in paragraph 2 was retained.

59. **Mr. SHARIAT-BAGHERI** (Islamic Republic of Iran) recalled the recent statement adopted by the States members of the Non-Aligned Movement at Cartagena. The Security Council's responsibilities under the Charter should not limit the role of the Court as a judicial body. The Court should be empowered to pronounce on acts of aggression independently if the Council failed to perform its role within a certain period of time, and it should be able to decide on the responsibility of an individual for an act of aggression freely, without political influence.

60. **Mr. STIGEN** (Norway) supported Security Council referrals of "situations", as opposed to cases, to the Court, and welcomed the relevant provisions of articles 6 and 10 in the "Further option for articles 6, 7, 10 and 11". The formula in article 10, paragraph 2, was satisfactory, and the Belgian suggestion to include language providing for preservation of evidence in that connection (see document A/CONF.183/C.1/L.7) was attractive.

61. The Statute should include a reference to the power of the Security Council to create ad hoc tribunals. In general, he had no fear that a Security Council role would lead to political interference with the independence of the Court.

62. **Mr. NYASULU** (Malawi) said it was clear that the Security Council should be among those entities empowered to refer situations to the Court, thus obviating the need for the creation of ad hoc tribunals. That would not mean that the Council would have any control over the action taken by the Court. The second subparagraph (b) of article 6 in the "Further option" covered that notion and was to be preferred.

63. He supported the subsequent articles of the "Further option". Should those texts not be acceptable, however, the first versions of articles 6 and 10 would have to be considered. Paragraph 1 of article 10 might not be necessary if agreement was reached on the relevant provisions of article 6. Paragraphs 2 and 3 were procedural and seemed unnecessary. On the remainder of the article, a compromise was needed, but it should be recognized that there was no incompatibility between the role of the Security Council under Chapter VII of the Charter and the functions of the Court. For paragraph 7, he suggested wording to the effect that no prosecution could be commenced when the Security Council had so requested, that such a request was not to be interpreted as affecting the Court's independence, and that the Court could proceed if the Council took no action within a reasonable time.

64. **Mr. WOUTERS** (Belgium), introducing his delegation's proposal (A/CONF.183/C.1/L.7), said that Belgium favoured the texts for articles 6 and 10 contained in the "Further options for articles 6, 7, 10 and 11". The Belgian proposal was for an addition to paragraph 2 to take into account the risk that relevant evidence might disappear during the period in which investigation and prosecution were suspended. The Prosecutor would be authorized in such situations to take measures to preserve evidence.

65. **Mr. SADI** (Jordan) said that it was not clear to him why the Security Council should be singled out, in preference to other United Nations organs, as authorized to make referrals to the Court. Nor did he understand why the Council would need to request the suspension of an investigation for as long as 12 months. The Court should not become a mere appendage to the Council.

66. **Mr. KESSEL** (Canada) said he saw the role of the Security Council vis-à-vis the Court as a positive one, which would increase the Court's effectiveness and avoid the need for the continual creation of ad hoc tribunals to deal with specific situations. He agreed that there could be a time limit for the suspension of the Court's work,

but the role of the Security Council in stopping wars and thus saving lives must be taken into account. The draft contained sufficient safeguards to protect the Court's independence.

67. **Mr. TAÏB** (Morocco) feared that political decisions taken by the Security Council might unduly influence the Court's decisions or hinder its action. The Council's role should be limited to referrals of situations involving acts of aggression.

68. **Mr. DIAZ PANIAGUA** (Costa Rica) said it must be acknowledged that the Security Council had a responsibility under the Charter for the maintenance of international peace and security. To avoid conflict, the role of the Council must be coordinated with the role of the Court in such a way that the latter's independence was guaranteed. Referrals by the Council to the Prosecutor should only be made under Chapter VII of the Charter, and the square brackets in the second subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11" should be deleted. He agreed with the representative of Jordan that a twelve-month period of suspension of an investigation was too long. In any event, a request for such a suspension should only be made following a formal resolution on the part of the Security Council. He fully supported the Belgian proposal.

69. He agreed with earlier speakers that the Charter did not give the Security Council a monopoly in determining that an act of aggression had been committed. That could be determined by the victim State, the General Assembly or the Court. He therefore could not support paragraph 1 of article 10 in the "Further option".

70. **Mr. KAUL** (Germany) supported the inclusion of the second subparagraph (b) of article 6 in the "Further option". He also supported article 10, including the material in square brackets in paragraph 2, and the addition proposed by Belgium (A/CONF.183/C.1/L.7).

71. **Mr. A. DOMINGOS** (Angola) said that, in the case of any conflict of competence, there was need to ensure objectivity and credibility, and that could be done through the mechanism of prior authorization by the Pre-Trial Chamber. Articles 12 and 13 offered a good basis for agreement in that respect.

72. **Mr. AL-JABRY** (Oman) said that, if article 12 was retained, he would like to see changes made in the text to curb the powers of the Prosecutor to initiate action ex officio. To ensure the Court's independence, the role of the Security Council should be limited to referrals in cases of aggression.

73. **Mr. ONWONGA** (Kenya) said he was prepared to consider proposals that would strike a balance between the independence of the Court on the one hand and the proper role of the Security Council on the other. The proposed article 10 in the "Further option for articles 6, 7, 10 and 11" would serve as a useful starting point in that regard.

74. **Mr. DA COSTA LOBO** (Portugal) felt that the Security Council had a role to play within the area of its security responsibilities. Article 10 in the "Further option", with the Belgian amendment, would satisfy his concerns.

75. **Mr. van BOVEN** (Netherlands), referring to the proposals in the "Further option", said that he approved the provision allowing referral of a situation by the Security Council, which would institutionalize an already existing practice with regard to the situation in the former Yugoslavia and Rwanda. Paragraph 2 of article 10 should be worded positively, to the effect that an investigation or prosecution could be commenced or proceeded with unless the Security Council had requested suspension. It was also unclear up to what point the Security Council could

intervene. It was essential to retain the reference to Chapter VII of the Charter. He fully supported the Belgian amendment.

76. Lastly, if the Conference decided to include the crime of aggression in the Statute of the Court, the role of the Security Council as defined in paragraph 1 of article 10 seemed to him essential.

77. **Ms. SHAHEN** (Libyan Arab Jamahiriya) supported the views expressed by Mexico and India. To give the Security Council, which was a political body, the right to trigger action would destroy confidence in the impartiality and independence of the Court, and thus detract from its credibility. Such an arrangement would enable the permanent Members of the Security Council to make the Court a tool for putting pressure on small, developing countries. Accordingly, her delegation considered that all references to the Security Council should be deleted from the draft Statute.

78. **Mr. SALINAS** (Chile) said he supported the provision allowing the Security Council, under Chapter VII of the Charter, to refer to the Prosecutor situations which constituted a threat to peace and security, provided it had adopted a resolution to that effect. However, the Security Council should not be authorized to refer to the Prosecutor situations under Chapter VI of the Charter, as provided for in draft article 10, paragraph 3.

79. The problem of how to reconcile the independence of the Court with the freedom of the Security Council to take action if faced with a political crisis or a threat to peace was a difficult and sensitive one. It would be necessary to try to ensure that the Security Council acted strictly in accordance with its mandate under the Charter.

80. **Mr. RODRIGUEZ CEDEÑO** (Venezuela) said that it was quite legitimate for the Security Council to submit to the Court situations related to matters that fell within its competence. However, his delegation could not support the proposed provisions that would allow the Council to impose conditions on the Court.

81. **Mr. JANDA** (Czech Republic) said that the Security Council should be able to bring situations to the attention of the Court, and that the Court should not be able to consider an act of aggression unless the Security Council had first determined that such an act had been committed. Regarding the suspension of proceedings, he could accept the wording of paragraph 2 of article 10 in the "Further option for articles 6, 7, 10 and 11", with the addition proposed by Belgium, provided that all brackets in the text were removed.

82. **Mr. BELLO** (Nigeria) said that the Court should be free of all outside influence; however, there was no escaping the fact that the Security Council had a role under Chapter VII of the Charter. He could accept the text of the second subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11", without the square brackets.

83. However, the provisions proposed in article 10 in the "Further option" would be a travesty of justice. If the Security Council had jurisdiction to determine whether or not an act of aggression had been committed, the Court's hands would be tied, whatever was said about its independence not being affected. Moreover, how could aggression on the part of one of the permanent members of the Security Council be referred to the Court if that member could veto such a referral? If it was the Conference's aspiration to create a free, fair and independent Court, the proposed article 10 should be rejected.

84. **Ms. LI Ting** (China) said that her delegation could not accept the provisions allowing the Prosecutor to initiate action ex officio; article 6 (first version), paragraph 1 (c), should be deleted.

85. It was essential that the Security Council be empowered to refer cases to the Court, since otherwise it might have to establish a succession of ad hoc tribunals in order to discharge its mandate under the Charter. The Security Council should also have the power to determine whether acts of aggression had been committed. The operations of the Court should not impede the Council in carrying out its important responsibilities for maintaining peace and security.

86. **Mr. SKIBSTED** (Denmark) said that the Security Council should be competent to refer situations to the Court, but should not interfere with its proceedings in any other way. The Council had exclusive responsibility for determining the existence of an act of aggression, but only the Court could decide whether the crime of aggression had been committed by an individual. The role given to the Council in the Statute meant that the crime of aggression must inevitably become one of the core crimes to be dealt with by the Court.

87. **Mr. VERGNE SABOIA** (Brazil) said that while he favoured an independent Court he believed there should be a functional relationship between it and other organs of the United Nations. He therefore supported the view that the Security Council should be empowered to refer situations to the Court, acting under Chapter VII and possibly also under Chapter VI of the Charter.

88. A decision by the Security Council to halt a prosecution by the Court should only be taken following a formal decision under Chapter VII and for a limited period of time. He therefore favoured either paragraph 7, option 2, in the first version of article 10, or the draft for article 10 in the "Further option for articles 6, 7, 10 and 11", provided that those two points were preserved. He supported the Belgian proposal (A/CONF.183/C.1/L.7).

89. **Ms. MEKHEMAR** (Egypt) urged that the Security Council's role should be kept within narrow limits to avoid politicizing the Court. The Council should be empowered to trigger the Court's action only when acting under Chapter VII of the Charter; the final decision would be taken by the Court. As she understood Article 39 of the Charter, the role of maintaining peace and security did not belong only to the Security Council, but also to other United Nations bodies, notably the General Assembly.

90. Concerning article 10, she rejected the idea that the Security Council should be permitted to impose restrictions on the Court. While the Council should have the right to deal initially with some matters, it should be empowered to prevent the Court from dealing with them only for a limited, non-renewable period.

91. **Ms. WONG** (New Zealand) supported the view that it needed to be made clear in the text that the Security Council could only prevent Court action by adopting a formal and specific resolution. With that clarification and the inclusion of a specific time limit, she could accept article 10 in the "Further option for articles 6, 7, 10 and 11".

92. **Mr. POLITI** (Italy) said that he, too, favoured enabling the Security Council to refer situations to the Court, to obviate the need for establishing new ad hoc tribunals whenever one or more of the core crimes appeared to have been committed. He preferred the formulation used in the second subparagraph (b) of article 6 in the "Further option". The text of article 10, paragraph 1, in that option was acceptable to his delegation.

93. The issue of the Security Council's power to block intervention by the Court was a delicate one, and it was important to provide guarantees that the Court's action would not be indefinitely impeded or gravely prejudiced. Any request for deferral of an investigation should be made only following a formal decision by the Council, and be confined to a specific period of time, with limited possibility of renewal. He, too, supported the Belgian proposal regarding the Prosecutor's right to take steps to preserve evidence.

94. **Ms. PIBALCHON** (Thailand) said that Thailand had no objections to article 6 (first version), paragraph 1 (a), or to article 10, paragraph 1, in the "Further option". She supported the view expressed by New Zealand that suspension by the Security Council of the Court's proceedings should depend on a Council resolution.

95. **Ms. WILMSHURST** (United Kingdom) said that her delegation strongly supported enabling the Security Council to make referrals, but agreed that that should be under Chapter VII of the Charter, and that the square brackets in the second subparagraph (b) of article 6 in the "Further option" should be deleted. She was somewhat puzzled by the fears expressed by some delegations that such referrals would interfere with the independence of the Court simply because the Security Council was a political body: no one had accused the Security Council of interfering with the independence of the Tribunals for the former Yugoslavia and Rwanda, which had already been in operation for some time.

96. Concerning article 10 in the "Further option", she would favour removal of the brackets around "for a period of twelve months", in paragraph 2 but was not sure whether the reference to Chapter VII was appropriate, since the Council could be acting in accordance with its various responsibilities under the Charter.

97. **Mr. MATSUDA** (Japan) said that the relationship between the Security Council and the Court was a key issue. Since crimes within the Court's jurisdiction would be the most serious crimes of international concern, and since the Council was the principal organ responsible for maintaining international peace and security, it was right that the latter should have a role under the Statute. The Council should have the power to refer a situation to the Court, and in his view the consent of the parties concerned should not be required.

98. It would not be appropriate to totally prohibit the Court from exercising its functions with respect to a case simply because that case had already been taken up by the Security Council. In that regard, Japan basically supported the text in article 10 in the "Further option".

99. **Ms. DASKALOPOULOU-LIVADA** (Greece) said that she had no objection to the Council referring cases to the Court provided that it was acting under Chapter VII of the Charter. In regard to acts of aggression, she would favour the first two paragraphs of option 2 for paragraph 7 in the first version of article 10, including the reference to a time period and to the need for a format and specific decision by the Council. She could not support the proposed article 10 in the "Further option".

100. **Mr. DABOR** (Sierra Leone) said that he would have no objection to paragraph 1 of article 10 in the "Further option", but considered that the period of 12 months provided for in paragraph 2 was far too long: he proposed that the period be reduced to six months. He endorsed the Belgian proposal for preservation of evidence during such a period, and thought that witnesses, too, should be protected.

101. Further clarification was required concerning paragraph 2. The text as it stood would cover all crimes and not only the crime of aggression; it would be very dangerous, particularly if proceedings had already begun. There should also be a provision allowing a request for suspension of proceedings to be renewed once only.

102. **Mr. Tae-hyun CHOI** (Republic of Korea) said that his delegation could accept paragraphs 1, 2, 3, 5 and 6 of the first version of article 10. It favoured option 2 for paragraph 4, and option 2 for paragraph 7, without paragraph 2 of that option. In paragraph 3 of that option, the period of time in question should be specified.

*The meeting rose at 6 p.m.*



**UNITED  
NATIONS**



**United Nations Diplomatic Conference  
of Plenipotentiaries on the Establishment  
of an International Criminal Court**

**Rome, Italy  
15 June-17 July 1998**

**Distr.  
GENERAL**

**A/CONF.183/C.1/SR.11  
20 November 1998**

**ORIGINAL: ENGLISH**

---

**COMMITTEE OF THE WHOLE**

**SUMMARY RECORD OF THE 11th MEETING**

**Held at the Headquarters of the Food and Agriculture Organization of the United Nations  
on Monday, 22 June 1998, at 7 p.m.**

**Chairman: Mr. IVAN (Romania) (Vice-Chairman)**

**CONTENTS**

**Agenda item**

**Paragraphs**

- 11 Consideration of the question concerning the finalization and adoption  
of a convention on the establishment of an international criminal court  
in accordance with General Assembly resolutions 51/207 of  
17 December 1996 and 52/160 of 15 December 1997 (*continued*)**

**1-48**

---

**This record is subject to correction.**

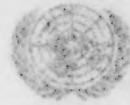
**Corrections should be submitted in one of the working languages, set forth in a memorandum and/or incorporated in a copy of the record. They should be sent under the signature of a member of the delegation concerned to the Chief of the Official Records Editing Section, Room DC2-750, United Nations, New York.**

**In accordance with the rules of procedure for the Conference, corrections may be submitted within five working days after the circulation of the record. Any corrections to the records of the meetings of the Committee of the Whole will be consolidated in a single corrigendum.**

**V.98-57464 (E)**

**99-80987 (E)**





*The meeting was called to order at 7.10 p.m.*

**CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (continued) (A/CONF.183/2/Add.1; A/CONF.183/C.1/L.7)**

*Part 2 of the draft Statute (continued)*

*Jurisdiction (continued)*

1. **Ms. DIOP** (Senegal), referring to the role of the Security Council in respect of the International Criminal Court, said that, in her delegation's view, no political structure should hamper the Court's action. The Court should be independent of the Council and any other political body. Regarding the Council's referral of matters to the Court, her delegation could accept the second subparagraph (b) of article 6 in the United Kingdom proposal ("Further option for articles 6, 7, 10 and 11" in document A/CONF.183/2/Add.1), with the deletion of the square brackets around the words "acting under Chapter VII of the Charter of the United Nations". With regard to article 10, the work of the Court should not be obstructed by the action of the Council. The former was a legal authority and the latter a political body, and they should perform their roles within their respective spheres. The inclusion of language pointing to the need for coordination between their activities might be considered, but otherwise Senegal favoured the deletion of article 10, whether in the original version or the United Kingdom version, and also of paragraph 3 of article 11 in the United Kingdom proposal.
2. **Ms. CHATOOR** (Trinidad and Tobago) said that, in her delegation's view, there had to be a relationship between the Security Council and the Court, particularly when the Council acted under Chapter VII of the Charter. However, only situations, and not individual cases, should be referred to the Court by the Council, and the latter's determination under Chapter VII of the Charter should be supported by a specific resolution. With regard to article 10 of the United Kingdom proposal, her delegation could go along with paragraph 1 if acts of aggression were included in the crimes within the Court's jurisdiction, but felt that the twelve-month period proposed in paragraph 2 was perhaps too long. Finally, Trinidad and Tobago could support the proposed amendment to provide for the preservation of evidence.
3. **Mr. GÜNEY** (Turkey) said that it was reasonable for the Security Council, as a body which had set up ad hoc tribunals, to be able to refer cases to the Court. However, where the Council acted pursuant to Chapter VII of the Charter, an appropriate balance needed to be established between it and the Court. The Turkish delegation considered the granting of full discretionary authority to the Prosecutor, whether *ex officio* or *proprio motu*, to be unacceptable, and favoured the deletion of article 6 (original version), paragraphs 1 (c) and 2, article 12 and article 13. Regarding the role of the Council, paragraph 2 of article 10 (United Kingdom proposal) could provide a basis for reaching a possible solution to the problem.
4. **Mr. KROKHMAL** (Ukraine) said that his delegation wished to emphasize that the Security Council was not the sole body responsible for the maintenance of international peace and security. Option 2 for paragraph 7 of article 10 (original version) and the United Kingdom proposal for article 10 were based on the idea that the determination of the facts regarding acts of aggression and of the prerequisites for the Court's exercising of its jurisdiction was the prerogative of the Council. Ukraine preferred option 1 for paragraphs 4 and 7 of article 10 (original version).

5. **Mr. JERMAN** (United Arab Emirates) said that interference of the Security Council, whose role was political, in the Court's activities could undermine the latter's independence and impede its work. There was a need to ensure that no contradiction arose between their respective roles. While it was admissible for a complaint to be lodged with the Prosecutor under Chapter VI of the Charter, careful thought should be given to the possibility of the Council's referral of such matters under Chapter VII. The Belgian and Singaporean proposals might serve to strike the necessary balance.
6. **Ms. VARGAS** (Colombia) said that her delegation felt that the Court's independence and impartiality should be clearly reflected in the Statute. While the Court should have an institutional relationship with the United Nations, none of the latter's bodies ought to have any influence over the Court or be able to obstruct its activities. Colombia viewed with concern those provisions of the draft which might enable the Council to thwart the jurisdiction of the Court. Despite the commendable efforts made to reach a compromise, it was necessary to seek further alternatives.
7. **Mr. YAÑEZ-BARNUEVO** (Spain) said that his delegation considered that the Statute should make provision for the Security Council to be able to refer situations to the Court whenever crimes specified in the Statute appeared to have been committed. That would enable the Council to avoid establishing ad hoc tribunals and would allow it to discharge its functions pursuant to Chapter VII of the Charter. Some delegations had mentioned the possibility of the referral of submissions to the Court by other United Nations bodies. That was acceptable to Spain, provided that they were principal, and not subsidiary, organs; any such referral would not have the same effect as a referral by the Council acting under Chapter VII of the Charter. His delegation agreed with the observations by the representative of Italy concerning the role of the Council with regard to the crime of aggression.
8. Concerning the issue of the suspension of proceedings at the request of the Council, the provision contained in article 23, paragraph 3, of the original draft Statute prepared by the International Law Commission had the effect of requiring the Court to seek the Council's permission to engage in proceedings relating to matters already under consideration by the Council, with the possibility of a veto by one of its members. That was totally unacceptable. The compromise submitted by Singapore and amended by Canada, involving a request for a temporary suspension of proceedings, could, together with a number of safeguards, be envisaged. Neither the wording of paragraph 6 of article 10 (original version) nor that of paragraph 2 of the United Kingdom proposal for article 10 (in the "Further option for articles 6, 7, 10 and 11") was entirely satisfactory. The text should be couched in positive terms, as proposed by the Netherlands. The request should be made formally, in a way that enabled the Council to exercise its authority pursuant to the Charter, and a formal decision on the request should be taken by the Court after it had heard the views of the Prosecutor and interested States. An extension of the suspension should be allowable but subject to a time limit. The Court should take all appropriate measures for the preservation of evidence and any other precautionary measures in the interests of justice. For the sake of clarity, the various issues might be set out in separate provisions.
9. **Mr. GEVORGIAN** (Russian Federation) said that, in his delegation's view, the triggering role should be an unconditional right of the Security Council. With regard to paragraph 2 of the United Kingdom proposal for article 10, the Russian Federation did not believe that it was possible in principle for the provisions of the Charter to be amended by any other international instrument; those provisions would override any others. Extreme caution was therefore called for in the drafting of the Statute. His delegation did not see any conflict between the "political" role of the Council and the activities of the Court. The Council was intended to have a political impact on States and the Court would be playing an essential role in the maintenance of peace and security.

10. **Mr. CHUKRI** (Syrian Arab Republic) said that, under article 10, paragraph 1, of the United Kingdom proposal, the Court would be unable to exercise jurisdiction with respect to a crime of aggression unless the Security Council had first determined that a State had committed such an act. In over 200 cases dealt with by it, the Council had avoided making such a determination. It had become a club of superpowers, whose right of veto could protect thousands of international criminals by blocking the Court's procedures. Therefore, in order to have a court that would deal with all who committed international crimes, his delegation was against assigning any role to the Security Council.

11. **Mr. MORSHED** (Bangladesh) said that he did not believe the dichotomy between the political and legal roles to be valid. When the Security Council acted under Article 39 of the Charter in cases involving the crime of aggression, its determination was the legal characterization of a situation. No court could escape the binding effect of such a determination. His delegation wished to reserve its position concerning the Council's role with regard to other crimes, particularly war crimes and those involving weapons of mass destruction, where the prevailing regime was so discriminatory that situations of considerable instability could arise.

12. **Mr. SEREKOISSE-SAMBA** (Central African Republic) said that the Security Council should not be denied the right to refer matters to the Court. The provision in article 10, paragraph 2, of the United Kingdom proposal ("Further option for articles 6, 7, 10 and 11") granting the Council power to suspend proceedings reflected a commendable desire to harmonize the actions of those two bodies; however, harmonization did not mean obstruction. Bearing in mind the operation of the statute of limitations under article 27, his delegation felt that paragraph 2 should be reworded so that the Council's right of suspension could not be renewed indefinitely.

13. **Mr. ROGOV** (Kazakhstan) said that the role of the Security Council should be limited to the initiation of cases or proceedings, whereupon the Court should be able to act independently. Perhaps the Council could be empowered to request the Court to suspend its consideration of a case, without the Court's decision on that request being prejudged. However, the Council's role in such an important issue as the determination of acts of aggression should not be disregarded. It might be true that the Council was not adapted to present-day circumstances and that the Charter should be amended accordingly, but for the time being the Council's role must be recognized.

14. **Mr. MANSOUR** (Tunisia) said that it was important to emphasize both the role played by the Security Council in the maintenance of international peace and security and the distinction between the political role of the Council and the legal role of the Court. The Council should be allowed to perform its role in accordance with Chapter VII of the Charter.

15. **Mr. ROWE** (Australia) said that Australia favoured the granting of power to the Security Council to refer situations to the Court when acting under Chapter VII of the Charter. It thus supported article 6, paragraph 1 (a), and article 10, paragraph 1 (original version). It also supported article 6 (b) of the United Kingdom proposal. If acts of aggression were included in the crimes within the Court's jurisdiction, Australia would support the proposal that no action by the Court be allowed to proceed without an appropriate determination by the Council under Article 39 of the Charter. In that regard, his delegation favoured option 1 for article 10 (original version), paragraph 4. Concerning the balance to be struck between the independence of the Court and the powers of the Council in matters being dealt with by the Council, his delegation believed that option 2 for article 10, the proposal by Singapore and Canada, in conjunction with article 10, paragraph 2, of the further option, represented the best approach for finding an acceptable solution.

16. **Mr. SCHEFFER** (United States of America) said that, in his delegation's view, it was important for the Security Council to refer situations to the Court under both Chapters VI and VII of the Charter. Consideration

needed to be given to the different consequences arising from a referral under those two authorities. It might be necessary to examine exactly how to word article 10, paragraph 2, of the United Kingdom proposal. The United States delegation believed that a formal resolution by the Council was required with respect both to referrals and to the Council's actions as described in that paragraph 2, and that any action under that paragraph did not have to be exclusively action by the Security Council pursuant to Chapter VII. The Belgian proposal (A/CONF.183/C.1/L.7), although interesting, was vague and would require further discussion.

17. **Mr. MAHMOOD** (Pakistan) said that all decisions of the Security Council, which was a political organ of the United Nations, were based on political considerations rather than legal principles. Pakistan found it difficult to accept that such political considerations should be infused into the functioning of the Court, and therefore shared the view that the Council should not have a role in the Court.

*Articles 14 to 19 (admissibility)*

18. **Mr. HOLMES** (Canada), Coordinator, introducing articles 14 to 19, said that article 14 might be unnecessary in view of the similar text in paragraph 1 of article 17. He understood that most delegations felt that article 14 could be deleted, subject perhaps to clarification in article 17.

19. Article 15, entitled "Issues of admissibility", was the result of extensive discussions in the Preparatory Committee concerning the principle of complementarity. In those discussions, virtually all States had indicated the importance which they attached to the inclusion of the principle of complementarity in the Statute—the principle that the primary obligation for the prosecution of crimes falling within the jurisdiction of the Court lay with States themselves. Also, most delegations had been of the view that, when States were unable or unwilling to fulfil that obligation, the Court should have jurisdiction to intervene. The idea was not that the Court should serve as an appellate body or a court of last resort for national legal systems. Where States assumed their obligations, the Court had no role; only where there was a failure due to inability or unwillingness was the Court engaged. Paragraph 1 of the article set out the basic approach, namely that the Court would determine that a case was inadmissible if it was being investigated or prosecuted by a State, or had been investigated and a decision not to proceed had been taken by the State, or the person concerned had already been tried, or the case was not of sufficient gravity. Subparagraphs (a) and (b) contained the exceptions where the Court could declare a case admissible, i.e. if the State was unwilling or unable to carry out the investigation or its decision not to prosecute was based on its unwillingness or inability to prosecute. The terms "unwillingness" and "inability" were defined in paragraphs 2 and 3 respectively. The draft in document A/CONF.183/2/Add.1 contained a number of footnotes indicating areas that might require adjustment depending on the outcome of discussions on other articles or parts of the draft Statute.

20. Article 16, relating to preliminary rulings regarding inadmissibility, had been proposed by the United States delegation, which had indicated that its proposal was not intended to reopen issues already agreed upon with regard to article 15, but related to different procedures affecting admissibility.

21. Article 17 dealt essentially with the procedural aspects of challenges to the jurisdiction of the Court or to the admissibility of a case. While agreement had been reached on most of its provisions in earlier discussions, some delegations had indicated that their final position would depend on the ultimate wording of article 15. Paragraph 1 set out the obligation of the Court to satisfy itself at all stages of the proceedings as to its jurisdiction over a case and the possibility for the Court to determine the admissibility of the case pursuant to article 15. The question of who had the right to challenge the admissibility of a case or the jurisdiction of the Court was dealt with in paragraph 2. All delegations had agreed that individuals, States and the Prosecutor should have that right. With regard to individuals, there was a link between paragraph 2 (a) and the question being dealt with by the Working

Group on Procedural Matters regarding an agreed definition of suspects. Concerning States, some delegations had argued that only States referred to in article 15 should be granted the possibility of making challenges, while other delegations had favoured wider definitions, as reflected in the bracketed subparagraphs following subparagraph (b) of paragraph 2. There had been consensus on the right of the Prosecutor to seek a ruling from the Court regarding issues of jurisdiction or admissibility. Paragraph 2 also provided for the possibility for other interested States to submit observations to the Court during its proceedings on admissibility or jurisdiction, and there had been agreement that victims, while not able to make a challenge, should also be entitled to make observations. The following two paragraphs described the modalities of such challenges and had been adopted by the Preparatory Committee without any square brackets, paragraph 3 stating that challenges could be made only once by any person or State prior to or at the commencement of the trial, and paragraph 4 stipulating that challenges must be made at the earliest opportunity, thereby ensuring that those procedures would not be used for purposes of delay or obstruction. However, in order to introduce flexibility for exceptional circumstances, it had been accepted that the Court itself could grant leave for a challenge to be brought more than once. Paragraph 5 dealt with the organ of the Court that would be competent to decide on issues of admissibility or jurisdiction. There had been general agreement that such matters should be referred to the Pre-Trial Chamber during the pre-trial stage and to the Trial Chamber after the charges had been confirmed. Paragraph 6, which had been deemed essential by a number of delegations, allowed the Prosecutor to request the Court to review a decision of inadmissibility if conditions required under article 15 were no longer met. However, the view had also been expressed that such a review procedure gave the Prosecutor too wide a power of appreciation over national proceedings.

22. Article 18, relating to the principle of *ne bis in idem*, was closely linked to article 15. The exceptions to paragraph 1 set out in paragraph 3 were closely linked to the criteria laid down in subparagraphs (a) and (c) of paragraph 1 of article 15. The footnotes to article 18 in document A/CONF.183/2/Add.1 related primarily to drafting, but footnote 59 dealt with the possible need for additional exceptions and reflected the view of a few delegations.

23. Article 19 was untitled. In the discussions of the Preparatory Committee on article 18, it had been proposed that, even if a person had already been convicted, the Court should be able to try the case if a manifestly unfounded subsequent decision by the national authorities resulted in the suspension or termination of a sentence. There had been insufficient time for delegations to agree that such a provision be included and, if so, on where it should be placed.

24. **Ms. MEKHEMAR** (Egypt) said that her delegation had reservations regarding the deletion of article 14. It was still examining articles 15 and 18.

25. **Mr. SCHEFFER** (United States of America) said that he would like to introduce article 16. While his delegation supported the text of article 15 on issues of admissibility, it had proposed article 16 after it had become clear in the discussions of the Preparatory Committee that there was growing support for the concept of referrals of overall situations to the Court by the Security Council, a State party, or the Prosecutor acting *proprio motu*. In line with the principle of complementarity, it would then seem necessary to provide for a procedure, at the outset of a referral, which would recognize the ability of national judicial systems to investigate and prosecute the crimes concerned. Under the proposed article, the Prosecutor would be able to proceed immediately to conduct an independent investigation if, in the face of a challenge by a national judicial system, the Prosecutor could persuade the judge to allow him to do so. That did not contravene the principle set out in article 17, paragraph 3, whereby a person or State could challenge admissibility only once concerning an individual case relating to an individual suspect. The United States proposal concerned an overall matter referred to the Court at an earlier stage, when no particular suspects had been identified, and a State's right to launch full-scale investigations. Further consultations

on the precise text would be useful. On the question of the preservation of evidence, consideration needed to be given to that not only in the context of the early stage of investigations dealt with in article 16 but also in the Committee's discussion of article 54 and other discussions concerned with the Prosecutor's right of investigation. In addition, it would be desirable to ensure that, at the initiative of the Prosecutor, the Court took account of any radical change in the circumstances in a country while its judicial system was conducting an investigation.

26. Copies of the statement of explanation on article 16 which had originally been submitted by his delegation to the Preparatory Committee would be made available to delegations present.

27. **Mr. GONZALEZ GALVEZ** (Mexico) said that the way in which the principle of complementarity was formulated was important. If it could not be based on the consent of States, there needed to be exceptions to national jurisdiction and safeguards to prevent interference with the sovereignty of States. His delegation would comment on article 15 when the proposed amendments which it had submitted in writing to the Secretariat had been distributed. Mexico felt that article 14 was unnecessary and could be deleted. Article 16 provided a sound basis for further examination. It was an important text, which supplemented the guarantees which the Statute aimed to provide.

28. **Mr. CORTHOUT** (Belgium) said that his delegation supported the deletion of article 14, which was redundant. It agreed in principle with article 15. Article 16 would add new obstacles to the exercise of the Court's jurisdiction; Belgium was therefore in favour of its deletion. Regarding article 17, challenges to the admissibility of a case should be possible only for an accused or for a State party which had jurisdiction over the crime on the ground that it was investigating or prosecuting the case or had investigated or prosecuted the case; also, his delegation favoured the inclusion of the proposed paragraph 6. The rule *ne bis in idem* was a fundamental principle of criminal procedural law and should apply in the two ways covered in paragraphs 1 and 2 of article 18, but should not be used to conceal situations or prevent the Court from exercising its jurisdiction in cases where an accused was the subject of a fake trial at the national level. Belgium therefore strongly supported the exceptions provided for in paragraph 3. Article 19, originally co-sponsored by Belgium, was intended to deal with situations where a person had been convicted at the national level but where the sentence was subsequently rendered ineffective through a manifestly unfounded decision on the suspension of its enforcement, or through a pardon, parole or commutation. If that measure prevented the application of an appropriate penalty, the Court should be empowered to exercise jurisdiction over the person concerned.

29. **Mr. SALINAS** (Chile) said that his delegation considered that article 14 was unnecessary and should be deleted. Regarding article 15, there was a need to explain more clearly the vague reference in paragraph 1 (d) to sufficient gravity in regard to the justification of the Court's further action. Chile considered a revision of the formulation of article 16 to be necessary, but would reserve its comments until it had examined the explanatory paper referred to by the representative of the United States of America. Finally, it fully supported the text of article 16, in particular the provisions of its third paragraph.

30. **Ms. ASSUNÇÃO** (Portugal) said that her delegation accepted the negotiated text of article 15 and did not wish to reopen the discussion on it. Concerning article 17, it preferred the wording "an accused or a suspect" in paragraph 2 (a), favoured the term "State Party" in paragraph 2 (b) and supported paragraph 6. It agreed in principle to the text of article 18. Portugal, which had been a co-sponsor of article 19, believed that the limitations on the principle *ne bis in idem* should be confined to exceptional cases but that the cases specified in article 19 were necessary.

31. **Mr. SCHEFFER** (United States of America) said that, in his delegation's view, article 14 could be deleted provided that the principle which was contained in it remained in article 17. The text of article 15, as currently drafted, was acceptable. Regarding article 17, paragraph 1 would need to be retained; in paragraph 2 (a), the only individual allowed to make challenges should be an accused, since allowing a suspect to do so would complicate the Court's procedures; in paragraph 2 (b), the challenge should be permissible by any State which met the criteria set forth in that subparagraph, as it would be inconsistent with the principle of complementarity not to recognize the interests of States that were not parties; and paragraph 6 required further discussion to ensure that its provisions were not abused. The text of article 18 had been carefully formulated in previous discussions and should as far as possible remain intact. His delegation was still studying the proposed article 19.

32. **Mr. KELLMAN** (El Salvador) said that his delegation wished to stress that the application of the exceptions set out in article 18, paragraph 3 (a) and (b), and in article 19 was linked to the principle of complementarity. Certain positions adopted appeared to suggest a different interpretation of those provisions.

33. **Mr. BAZEL** (Afghanistan) said that his delegation believed that article 15 should additionally address the issue of admissibility in cases involving amnesties and should include a new paragraph providing for the inadmissibility of cases where there was a temporary interruption of a State's judicial system owing to civil strife. With regard to article 16, it preferred a one-year period in the last sentence of paragraph 2, and wished to suggest that the word "report" be replaced by "inform" in paragraph 4. The Afghan delegation believed that it was the sovereign right of States to decide on the commutation of a sentence or on a pardon, according to its national interests and crime policy, and therefore proposed the deletion of article 19.

34. **Ms. WILMSHURST** (United Kingdom) said that her delegation agreed to the deletion of article 14. It found article 15 acceptable. While sympathetic to the idea behind article 16, it had serious problems with the text as currently drafted, but was willing to consider any proposed changes. Regarding article 17, the United Kingdom delegation favoured "accused" in paragraph 2 (a); in paragraph 2 (b), it strongly supported the reference to "a State" since, if a State that was not a party was carrying out an effective prosecution in its own territory, there was no reason for the Court to intervene and also conduct a prosecution. Concerning article 19, while her delegation understood the reasons behind the proposed text, it was unsure whether it would be possible to reach agreement on it in view of the highly sensitive and difficult issues which it raised.

35. **Ms. DIOP** (Senegal) said that her delegation agreed that article 14 could be deleted. Article 15, which appeared to have broad support, was acceptable. Senegal had initially intended to request the deletion of article 16, but would re-examine the text in the light of the suggested changes. Concerning article 17, the phrase in square brackets should be deleted in paragraph 2 (a), and the reference to "a State Party" was preferable in paragraph 2 (b), since States parties would have obligations following ratification and the conduct of investigations and prosecutions would thus be facilitated. The text of article 17, paragraph 6, was acceptable, as was that of article 18, possibly with a few modifications.

36. **Mr. SKILLEN** (Australia) said that his delegation agreed to the wording of article 15 but not with the alternative approach described at the end of that article. It favoured the deletion of article 16, but would reserve its position pending additional clarifications. Australia agreed with the remarks made by the representative of the United Kingdom concerning article 17, paragraph 2 (b), to the effect that non-parties should also have the right to make challenges, and it supported the inclusion of paragraph 6 in that article. It generally agreed with the provisions of article 18 but disagreed with the "alternative approach" set out at the end of that article. Regarding article 19, his delegation sympathized with the proposal but would suggest that it should be dropped if most delegations felt that its negotiation would unduly delay the work.

37. **Mr. GÜNEY** (Turkey) said that, in his delegation's view, article 14 could be deleted provided that the principle laid down in it was reflected elsewhere in the Statute. Articles 15 and 16 could be left aside pending further proposals. Article 17 was acceptable. Article 18, which dealt with one of the basic principles of criminal law, was closely linked to article 15 and needed to be brought into line with article 5 once a decision had been reached on it. With regard to article 19, Turkey agreed with the view expressed by the United Kingdom delegation.

38. **Mr. SYQUIA** (Philippines) said that his delegation had no objection to the deletion of article 14, which appeared to be redundant. Article 15 was acceptable. The support of the Philippines for article 16 would be subject to the information to be provided by the United States delegation. With regard to article 17, the phrase "an accused" was preferred in paragraph 2 (a), since there was no point in a suspect's being able to question admissibility; in paragraph 2 (b), the use of the term "State Party" was favoured; it would open up a two-way relationship between the Court and States parties whereas to allow States not parties to challenge admissibility would involve a one-way relationship, because the Court could not determine whether such States observed the principles laid down in the Statute. There were no objections to the text of article 18, or to that of article 19 provided that it did not include amnesty.

39. **Mr. ZIMMERMANN** (Germany) said that his delegation agreed to the deletion of article 14. Article 15 represented a carefully drafted compromise which should stand as presently worded. Concerning article 16, Germany wished to reserve its position until it had seen the written details to be provided by the United States delegation. With regard to article 17, only the accused and any State which had jurisdiction over the crime on the ground that it was investigating or prosecuting the case, or had investigated or prosecuted the case, should be able to challenge the jurisdiction of the Court; also, paragraph 6 of that article should be retained. Finally, the text of article 18 should remain as it stood.

40. **Ms. LEHTO** (Finland) said that, in her delegation's view, article 14 should be deleted. Article 15 was the result of extensive discussions and represented a good compromise; it should be retained as currently drafted. Footnote 42 to that article could be disregarded, since articles 18 and 19 dealt with the matters referred to in it. While appreciative of the presentation made by the representative of the United States on article 16, her delegation was still unconvinced of the need for such a procedure, but might wish to comment on the details subsequently. Concerning article 17, Finland's preference was for the deletion of the text in square brackets in paragraph 2 (a), the use of the words "A State Party" in the first line of paragraph 2 (b) and the deletion of the two bracketed subparagraphs following paragraph 2 (b). Paragraph 6 should be retained. Her delegation supported article 18, in its present form, and article 19, but was flexible with regard to its drafting.

41. **Ms. VARGAS** (Colombia) said that her delegation agreed to the deletion of article 14 provided that the principle involved was reflected in article 17. It wished to see the Mexican proposals before taking a decision on article 15 and would examine the information to be submitted by the United States delegation before adopting a position on article 16. Regarding article 19, Colombia agreed with the United Kingdom that major difficulties would be entailed in its negotiation and that it would thus be preferable to delete the article.

42. **Mr. NATHAN** (Israel) said that his delegation favoured the deletion of article 14. Article 15 should be retained as currently worded. Article 16 would be given further consideration once the additional details had been made available by the United States delegation. With regard to article 17, in paragraph 2 (a) the words "or a suspect" should be retained; in paragraph 2 (b), the right of challenge should be conferred on all States and not solely on States parties; and paragraph 6 should be retained as presently drafted. While fully in agreement with the principle set out in article 18, his delegation felt that the wording of paragraph 3 (b) should perhaps be looked at since the concept seemed to overlap partly with that in paragraph 3 (a). Israel had a problem with article 19, since

it might imply unwarranted interference with decisions of administrative organs of a State which had already tried a person for crimes covered by the Statute.

43. **Mr. YEPEZ MARTINEZ** (Venezuela) said that his delegation considered article 14 to be unnecessary since its substance appeared elsewhere in the Statute. While it would study the amendments to be submitted by the delegation of Mexico, it would prefer article 15 to remain unchanged, as its text represented a harmonious balance arrived at during earlier consultations. Concerning article 16, Venezuela would await the paper to be provided by the United States delegation, but did not feel that such an article was necessary. With regard to article 17, the text of paragraph 1, dealing with the responsibility of the Court to satisfy itself as to its jurisdiction, should form a separate article; in paragraph 2 (a), reference to "an accused" only was preferable; and, in paragraph 2 (b), only States parties should be able to make challenges. Article 19 did not add clarity and should be deleted.

44. **Mr. SACIRBEGOVIC** (Bosnia and Herzegovina) said that his delegation felt that the "alternative approach" referred to in document A/CONF.183/2/Add.1 following article 15 and also following article 18 might be used to provide immunity from prosecution. In the situation prevailing in his region, a defence frequently employed in cases where persons were indicted was that they were being brought to trial by a national court, when that was not in fact true.

45. It had been asked why the Court should have jurisdiction over a matter being effectively handled by a national court, but he wished to point out that the main reason why the International Criminal Tribunal for the Former Yugoslavia, for example, had been set up was not because prosecution by local courts would have been ineffective but because the crimes involved were of such a nature that they demanded international attention.

46. **Ms. WYROZUMSKA** (Poland) said that, in her delegation's view, article 14 was redundant. The compromise text of article 15 had been achieved through long negotiations and should remain as it stood. Article 16 would create further obstacles to the Court's jurisdiction and should be deleted. With regard to article 17, Poland believed that, under paragraph 2, it should be possible for challenges to be made by an accused or by the State which had jurisdiction over the crime, and that the Prosecutor should be empowered to seek a ruling from the Court regarding a question of jurisdiction or admissibility; also, paragraph 6 should be retained. The wording of article 18 was acceptable. Poland shared the view that article 19 required further discussion and could pose problems, given the sensitivity of the issue; it would be preferable to delete it.

47. **Ms. LE FRAPER DU HELLEN** (France) said that her delegation would prefer to retain article 14 but could agree to its deletion if the principle it contained was reflected in article 17. The text of article 17, paragraph 1, might need redrafting: the Court should satisfy itself as to its jurisdiction as soon as a case was referred to it. The text of article 15 was well balanced and could be accepted. With regard to article 16, paragraph 1 was acceptable, but the point seemed already to be covered elsewhere in the Statute. Her delegation would revert to article 16 when more information was made available. Regarding article 17, it would be preferable to retain the reference to both an accused and a suspect; in paragraph 2 (b), the possibility of making challenges should not be available to States not parties; and paragraph 6, as currently worded, was acceptable. The text of article 18 could be accepted as it stood. Article 19 constituted an interesting proposal, but it would be very difficult to introduce such a sensitive provision into the Statute.

48. **Mr. MANSOUR** (Tunisia) said that his delegation had no objection to the articles on admissibility, but had questions regarding what would happen when certain individuals were prevented from being brought before the Court, and what standards would be applied by the Court in determining issues of admissibility under article 15. Also, the question of appeals was not mentioned in that article.

*The meeting rose at 9.40 p.m.*